89-502

No.

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAURANCE B. WOLFBERG,

Petitioner,

v.

ROBERT I. GREENBERG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

L. MARK WALKER
ROBERT E. BACHARACH
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Of Counsel

GARY W. DAVIS
Counsel of Record
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys for Laurance Wolfberg

September 22, 1989

QUESTION PRESENTED FOR REVIEW

Did the trial court err in holding that an individual partner can obtain compensation from the general partnership for his managerial services?

Petitioner prays for legal guidelines to prevent abuse in partnership dissolution wherein proper application of current law provides that an individual partner cannot make a personal profit at the expense of the other(s) during the dissolution period or obtain unequal compensation for services and non-partnership expenses.

If allowed to stand, the lower courts' decision, if allowed to stand, will result in chaos in the conduct of partnership business and dissolutions, encouraging unethical business practices.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED FOR REVIEW	-i-
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	11
APPENDICES	
Appendix A - Memorandum Opinion Western District of Oklahoma Filed December 17, 1987	A-1
Appendix B - Judgment Western District of Oklahoma Filed December 17, 1987	A-13
Appendix C - Order and Judgment Court of Appeals Filed May 31, 1989	A-15
Appendix D - Order Court of Appeals Filed June 26, 1989	A-17
Appendix E - Excerpts from Transcript of Proceeding, Western District of Oklahoma	A-18
Appendix F - General Partnership Agreement Green Wolf Company	A-31
Appendix G - Alpha Management Tax Return Summary	A-34

TABLE OF AUTHORITIES

Cases — Page(s)

Alford v. Lehman, 86 N.W.2d 330 (Mich. 1957) 7

Barthuly v. Barthuly, 223 N.W.2d 429 (Neb. 1974) 8

Boyer v. Bowles, 37 N.E.2d 489 (Mass. 1941)... 7

Cagnolatti v. Guinn, 189 Cal. Rptr. 151, 140 Cal. App. 3d 42 (1983) 7

Conrad v. Judson, 465 S.W.2d 819 (Tex. Civ. App. 1971), *cert. denied*, 405 U.S. 1041, 31 L. Ed. 2d 582 (1972) 8

Consaul v. Cummings, 222 U.S. 262, 56 L. Ed. 192 (1911) 6

Corbet v. Corbet, 472 P.2d 430 (Utah 1970) 8

Couri v. Couri, 447 N.E.2d 334 (Ill. 1983) 7

Harold J. Rosen Trust v. Rosen, 386 N.Y.S.2d 491, 53 A.D.2d 342 (N.Y. App. Div. 1976), *aff'd*, 371 N.E.2d 828 (N.Y. 1977) 8

Hooper v. Yoder, 737 P.2d 852 (Colo. 1987) 7

Insley v. Shire, 39 P. 713 (Kan. 1895) 6

Koenig v. Huber, 210 N.W.2d 825 (S.D. 1973)... 8

Leavenworth City & Ft. Leavenworth Water Co. v. City of Leavenworth, 166 P. 234 (Kan. 1917) 6

Murphy v. Dees, 307 So. 2d 1 (Ala. 1975) 7

Painter v. Hines, 122 P. 1036 (Kan. 1912) 9-10

Phillips v. Kula 200, Wick Realty, Inc., 629 P.2d 119 (Hawaii Ct. App. 1981) 7

Cases Page(s)

Sharp v. Laubersheimer, 347 N.W.2d 268 (Minn. 1984) 7-8

Statutes and Rules

28 U.S.C. § 1254(1) 2

Supreme Court Rule 17.1 4

Kan. Stat. Ann. § 56-318(f) 2, 5

Okla. Stat. tit. 54, § 218(f) 5

Model Codes

Uniform Partnership Act § 18(f) (1914) 5

Restatement (Second) of Conflict of Laws § 294 (1971) 5

Textbooks

1 Z. Cavitch, *Business Organizations* § 18.07 (1989) 8-9

H. Reuschlein & W. Gregory, *Handbook on the Law of Agency and Partnership* § 186 (1979) 9

13 J. Moore & H. Bendix, *Federal Practice* ¶ 317.25-1[1] (1988) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

LAURANCE B. WOLFBERG,
Petitioner,

v.

ROBERT I. GREENBERG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Laurance B. Wolfberg, respectfully seeks a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit, which was entered and filed on May 31, 1989. *See infra* Appendix D at page A-17.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma (Cauthron, Mag.) has not been reported. It is reprinted in Appendix A at page A-1. The magistrate's judgment is reprinted as Appendix B at page A-13. The opinion of the Court of Appeals for the Tenth Circuit has not been reported. It is reprinted as Appendix C at page A-15. The denial of rehearing by the Tenth Circuit Court of Appeals is also unreported. That opinion is reprinted as Appendix D at page A-17.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered and filed in the Court of Appeals for the Tenth Circuit on May 31, 1989. The Tenth Circuit Court of Appeals denied Mr. Wolfberg's petition for rehearing on June 26, 1989. This Court has jurisdiction under the United States Judicial Code, 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Kan. Stat. Ann. § 56-318(f) provides:

> The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> . . . .
>
> (f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his or her services in winding up the partnership affairs.

STATEMENT OF THE CASE

This action involves a general partnership, Green Wolf Oil Company ("Green Wolf"), which was formed in 1975 and dissolved in 1984. The two partners were Laurance B. Wolfberg and Robert I. Greenberg. In this action, Mr. Wolfberg sought recovery of his share of partnership properties and an accounting, based on Mr. Greenberg's alleged breach of his fiduciary duties. In doing so, Mr. Wolfberg claimed that Mr. Greenberg had improperly profited from his management of Green Wolf.

In forming Green Wolf, Messrs. Wolfberg and Greenberg sought to acquire and develop oil and gas leases. Trial Transcript at 15-16;[1] Plaintiff's Exhibit 1 at 1 No. 1 (reprinted as Appendix F at page A-31). Between 1975 and 1982, Mr. Wolfberg's principal responsibility was to make production decisions and select leases for Green Wolf. Mr. Greenberg's primary function was to obtain financing from outside parties and set the production fee for each well. Trial Transcript at 23-24.

In 1982, Mr. Greenberg agreed to assume responsibility for Green Wolf's accounting. According to Mr. Greenberg, the two men did not discuss whether he would receive compensation for his work. Trial Transcript at 291 & 347.

At that time, Mr. Greenberg began to manage Green Wolf's accounting functions and properties through Alpha Management Corporation ("Alpha"). Mr. Greenberg was the sole owner of Alpha. Trial Transcript at 142. Alpha simultaneously began to charge outside investors a monthly fee of $300.00 per well for production. Trial Transcript at 150-51. From this fee, Alpha received $167,677.00 in profit and $48,730.00 in interest. Trial Transcript at 198-99; Plaintiff's Exhibit 38 (reprinted as Appendix G at page A-34).

On December 17, 1987, the Honorable Robin J. Cauthron, a United States Magistrate, rendered judgment in favor of Mr. Greenberg. The Tenth Circuit Court of Appeals summarily affirmed the

---

[1]The cited portions of the trial transcript are reprinted collectively as Appendix E at page A-18.

judgment on May 31, 1989. The appellate court denied Mr. Wolfberg's petition for rehearing on June 26, 1989.

REASONS FOR GRANTING THE WRIT

Certiorari review is desirable when a federal court of appeals misinterprets state law in a manner likely to create a dangerous precedent. *See* Supreme Court Rule 17.1; 13 J. Moore & H. Bendix, *Federal Practice* ¶ 817.25-1[1], at 27 (1988). In the present case, the magistrate's ruling, coupled with the summary affirmance, are likely to endanger the stability of thousands of partnerships in the state of Oklahoma.[2]

The issue in the present case is whether a managing partner can obtain compensation for his services in the absence of an agreement. The trial court answered this question in the affirmative, and the Tenth Circuit Court of Appeals summarily affirmed. The magistrate's ruling, however, is unsupported by case law or logic.

Indeed, in *every* jurisdiction, the law expressly prohibits compensation for partners' managerial activities in the absence of an agreement. In Oklahoma, however, courts have not yet addressed this issue. As a result, the magistrate's ruling and its summary affirmance are the only guideposts for Oklahoma courts in their future treatment of partners' compensation. The likely result will be a gross inequity in the rewards available to partners in Oklahoma, as opposed to

---

[2]Approximately 11,831 limited partnerships are presently qualified to transact business in the state of Oklahoma. Telephone Interview with Gerry Smedley, Secretary of State for the State of Oklahoma (Sep. 19, 1989). The number of general partnerships qualified to conduct business in Oklahoma is unavailable.

other jurisdictions. In effect, the ruling will encourage managing partners in Oklahoma to take profits without any disclosure to their partners. Consequently, acceptance of the magistrate's ruling in Oklahoma would jeopardize the interests of every nonmanaging partner in that state. Under these circumstances, certiorari review is appropriate.

The Uniform Partnership Act, which has been adopted in every state, unambiguously provides:

> The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> . . . .
>
> (f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

Uniform Partnership Act § 18(f) (1914). The Kansas legislature[3] has adopted this section without modification. Kansas Uniform Partnership Act, Kan. Stat. Ann. § 56-318(f). Consequently, without a prior agreement, Kansas law unambiguously pro-

---

[3]In the present case, Kansas law is governing because of Green Wolf's formation and operation in that state. *See* Restatement (Second) of Conflict of Laws § 294 (1971). Oklahoma law, however, is identical. Oklahoma Uniform Partnership Act, Okla. Stat. tit. 54, § 218(f). As discussed in the text, Oklahoma courts have not yet confronted the present issue. *See supra* p. 4 & *infra* p. 10. As a result, the opinion of the magistrate, who resides in Oklahoma, will probably affect Oklahoma courts' future treatment of this issue. *See supra* pp. 4-5 & *infra* p. 10.

hibited Mr. Greenberg from obtaining the monthly production fee as compensation for his services to Green Wolf.

The Kansas Supreme Court addressed this provision in *Insley v. Shire,* 39 P. 713, 717 (Kan. 1895), and *Leavenworth City & Ft. Leavenworth Water Co. v. City of Leavenworth,* 166 P. 234, 236 (Kan. 1917). In both cases, the court held that partners are not entitled to compensation for their services in the absence of an agreement. The court reasoned that all partners must contribute their time, skill and ability to the partnership's business. *See, e.g., Leavenworth City & Ft. Leavenworth Water Co. v. City of Leavenworth,* 166 P. at 236 ("it is the duty of each partner to contribute his time, skill, and ability so far as the same is reasonably necessary to the conduct of the business without other compensation than a share of the profits"). Indeed, the United States Supreme Court adopted this rationale in *Consaul v. Cummings,* 222 U.S. 262, 56 L. Ed. 192 (1911). There the Court explained:

> Each partner is bound to devote himself to the firm's business, and there is no implied obligation that, for performing this duty, he should be paid more than his proportionate share of the gains. . . . In performing [his right or duty the partner] only carries out an obligation implied in the partnership relation, and is therefore entitled to no compensation for thus doing what he was bound to do. . . .

Id., 222 U.S. at 269-70, 56 L. Ed. at 196.

Every state court to address this issue has reached a similar result. Indeed, in every juris-

diction other than Oklahoma, individual partners are not entitled to remuneration for managerial activities in the absence of an agreement. *See Murphy v. Dees,* 307 So. 2d 1, 5 (Ala. 1975) ("[a]s a general rule, a partner . . . is not entitled to credit for his services absent an agreement for the same"); *Cagnolatti v. Guinn,* 189 Cal. Rptr. 151, 157, 140 Cal. App. 3d 42 (1983) ("[t]he rule is '[a]bsent an express agreement, a partner is not entitled to any compensation for his services to the partnership other than his share of the profits'"); *Hooper v. Yoder,* 737 P.2d 852, 860 (Colo. 1987) ("[u]nder ordinary circumstances, and in absence of agreement, a partner is not entitled to salary or other compensation for services in conducting the partnership business"); *Phillips v. Kula 200, Wick Realty, Inc.,* 629 P.2d 119, 123 (Hawaii Ct. App. 1981) ("[i]t is elementary partnership law that unless there is an express agreement among all the partners to the contrary, one partner may not make a profit for himself individually out of the partnership business"); *Couri v. Couri,* 447 N.E.2d 334, 339 (Ill. 1983) (holding that an individual partner was not entitled to compensation for his services because of the absence of a contrary agreement); *Boyer v. Bowles,* 37 N.E.2d 489, 493 (Mass. 1941) ("[i]n the absence of an express agreement, the rule that no compensation is to be allowed [to individual partners] precludes it, unless the other agreements as to the business to be done and the mode of conducting it show that compensation was intended"); *Alford v. Lehman,* 86 N.W.2d 330, 335 (Mich. 1957) ("under Michigan statute and case law, partners are not generally entitled to compensation for services"); *Sharp v. Laubersheimer,* 347 N.W.2d 268, 271 (Minn. 1984)

("the Minnesota Uniform Partnership Act fail[s] to provide that partners be reimbursed for services rendered on behalf of the partnership"); *Barthuly v. Barthuly,* 223 N.W.2d 429, 432 (Neb. 1974) ("[a] partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for such services"); *Harold J. Rosen Trust v. Rosen,* 386 N.Y.S.2d 491, 498, 53 A.D.2d 342 (N.Y. App. Div. 1976), *aff'd,* 371 N.E.2d 828 (N.Y. 1977) ("[g]enerally, the services of one partner are rendered for the common benefit of all and, absent some specific provision in the partnership agreement, the partner so rendering the services is not entitled to special compensation"); *Koenig v. Huber,* 210 N.W.2d 825, 827 (S.D. 1973) ("[i]n the absence of an agreement to the contrary, a partner is not entitled to compensation beyond his share of the profits"); *Conrad v. Judson,* 465 S.W.2d 819, 824 (Tex. Civ. App. 1971) ("[t]he general rule is that a partner is not entitled to compensation for services rendered to the partnership business unless there has been an agreement therefor"), *cert. denied,* 405 U.S 1041, 31 L. Ed. 2d 582 (1972); *Corbet v. Corbet,* 472 P.2d 430, 432 n.1 (Utah 1970) (referring to the rule "[t]hat generally a partner is not entitled to any remuneration for his services in the absence of an agreement by the partners to that effect").

Numerous commentators have also rejected the availability of compensation to individual partners for managerial activities. *See* 1 Z. Cavitch, *Business Organizations* § 18.07, at 967 (1989) ("the cases are numerous in which it has been held that, in the absence of an agreement, a partner is not entitled to compensation for ser-

vices rendered to the partnership"); H. Reuschlein & W. Gregory, *Handbook on the Law of Agency and Partnership* § 186, at 273 (1979) ("[a]lthough partners may devote varying amounts of time to the business, in the absence of contrary agreement, their compensation will be equal, i. e., no compensation other than a share of the profits").

Not surprisingly, the magistrate in the present case did not cite any authority for Mr. Greenberg's right to compensation for his services to Green Wolf. As the magistrate acknowledged, "[t]here was no formal agreement concerning the $300.00 charge". Memorandum Opinion at 9 (reprinted as Appendix A at page A-9). As discussed above, Mr. Greenberg testified that the partners had not discussed such compensation. *See supra* p. 3. As a result, the present case should have fallen under the general rule of a prohibition against "remuneration for acting in the partnership business". *See supra* p. 2.

As numerous courts and commentators have recognized, individual partners like Mr. Greenberg are obligated to contribute their time and labor to the partnership's management without any compensation.[4] *See supra* pp. 6-9. In every

---

[4]In her opinion, the magistrate hinted that Mr. Wolfberg's alleged neglect of the partnership might have justified Mr. Greenberg's compensation. Memorandum Opinion at 10-11 (reprinted as Appendix A at pages A-10 & A-11). The Kansas Supreme Court, however, squarely rejected such an argument in *Painter v. Hines*, 122 P. 1036 (Kan. 1912). There the court stated:

> The general rule is that inattention or misconduct by one of the partners does not entitle the other to an extra share of the proceeds unless damages to the partnership be shown, and, the defendant not being entitled to compensation for extra services and not claiming any, he should not have been allowed to recover on account of the plaintiff's

jurisdiction other than Oklahoma, the Uniform Partnership Act would prohibit collection of this fee in the absence of an agreement. Because of the absence of Oklahoma case law on this subject, the magistrate's ruling could lead to a gross distortion of partnership responsibilities in that state.

The trial court apparently assumed, without any authority, that managing partners may obtain compensation from the partnership in the absence of an agreement. Indeed, the magistrate found that "no agreement existed that Alpha would not charge Green Wolf its share of the monthly fee". Memorandum Opinion at 11 (reprinted as Appendix A at page A-11). This finding, however, is immaterial because of the necessity of an affirmative agreement for a partner to profit from his services. In the present case, the evidence was undisputed that Alpha profited from the defendant's services for Green Wolf. *See* Trial Transcript at 174 (testimony of Robert I. Greenberg). Consequently, the magistrate should have ruled, as a matter of law, that Alpha was not entitled to the monthly production charge as compensation for Mr. Greenberg's services to Green Wolf or allowed the profit charge contained in the "Well Charge" of $300 a month which was not representative of "Costs" but an arbitrary amount charged in the industry by "Full Service" oil companies.

---

alleged neglect or misconduct (without establishing, by proper evidence, a loss accruing thereby to the firm).

Id. at 1038.

CONCLUSION

Certiorari review is fully justified in the present case. Without intervention by this Court, the magistrate's ruling and its summary affirmance are likely to jeopardize the interests of all nonmanaging partners in Oklahoma.

Respectfully submitted,

L. MARK WALKER
ROBERT E. BACHARACH
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102

Of Counsel

GARY W. DAVIS
Counsel of Record
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102

Attorneys for Laurance B. Wolfberg

APPENDIX A

FILED
December 17, 1987
United States District Court,
Western District of Oklahoma
Robert D. Dennis, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2441-C

LAURENCE B. WOLFBERG,
Plaintiff,

vs.

ROBERT I. GREENBERG,
Defendant.

MEMORANDUM OPINION

Parties and counsel in this case, having consented to proceed before a United States Magistrate, 28 U.S.C. §636(c), appeared for nonjury trial before the undersigned on November 17 and 18, 1987. Testimony and exhibits were offered and admitted, and the Court has now received supplemental briefs and proposed findings of fact and conclusions of law, from both counsel. Having duly considered the evidence and the law, the Court enters the following memorandum opinion, which shall constitute its findings of facts and conclusions of law.

The parties in this case are brothers-in-law who formed a partnership for the purpose of exploring and developing oil and gas properties beginning in 1975. The partnership was known as Green Wolf Oil Company. Greenberg (defendant) and Wolfberg's (plaintiff's) wife are the only children of Mal Greenberg, who owned considerable property at his death, a piece of which formed the original basis for Green Wolf Oil Company. Originally, at the outset of Green Wolf, Wolfberg resided in Kansas and also operated a family business known as Service Business Forms in Wichita. At the same time, Greenberg resided in Oklahoma City and also operated a family business known as Seiberling Latex Products, Inc. Relations between the brothers-in-law, both business and personal, were always excellent until the early 1980's. Mal Greenberg had wanted each to be in business with the other, and had started each in the family business. In 1969, a parent or holding company was created, Service Computer Forms, which wholly owned both Service Business Forms and Seiberling. Wolfberg and Greenberg owned equal shares, and Mal (later his testamentary trust) owned a small percentage. In any event, the family businesses, both those mentioned above and other ventures, were profitable and amicably run.

In 1979, Green Wolf began charging a $300-per-well administrative charge shared, with respect to each well, by the joint interest owners, including Green Wolf. This charge was neither uncommon nor excessive, and has not been raised since. In 1980-81, Wolfberg moved from Wichita to Hawaii, then to Oklahoma City and back to Hawaii. He operated Service Business Forms from

each new residence. Seiberling Latex Products was liquidated, resulting in considerable cash gain, which was held by Service Computer Forms, the parent company.

In the spring of 1981, Greenberg was approached by an uncle, Robert Zeligson, whose business acumen and judgment Greenberg trusted and admired, about forming a well servicing company in which Greenberg, Zeligson's son, and Griffith, who had experience in well servicing, would be principals. The company would be known as Griffith Resources, and Zeligson wanted Greenberg to serve as chief executive and financial officer. Greenberg was extremely interested in the prospect, but declined to participate unless Zeligson would allow a 50/50 participation by Wolfberg. Because of the Green Wolf partnership, both men considered all oil and gas ventures (and apparently others, as well) to require joint participation or none at all. Zeligson agreed to the participation of Wolfberg only if Wolfberg had no active role in management, and his ownership share was held in trust. Wolfberg agreed to this proposal, and the joint interest of Wolfberg and Greenberg was placed in the Mal Greenberg Testamentary Trust, and later, at Wolfberg's insistence, a different trust was created to hold the Griffith interest. There was nothing, then or later, about the ownership or formation of Griffith Resources, Inc., that was kept from Wolfberg or done without both his knowledge and approval. Wolfberg did not appreciate and in fact resented being left out of management, and the decision by Zeligson to exclude him rankled, both then and now. It

was apparently over the formation of Griffith Resources that the relationship of the brothers-in-law started to crumble.

In October, 1982, it was decided and agreed between the brothers-in-law that their interests should be separated, to the extent practicable and possible. Wolfberg purchased Greenberg's share of Service Computer Forms for the cash generated by the sale of Seiberling Latex Products. Wolfberg purchased the share of the Mal Greenberg Testamentary Trust in Service Computer Forms by executing a note to the Trust. The parties maintained their partnership in Green Wolf, but agreed that Greenberg would run the partnership, as well as supervise their joint interest in Griffith Resources and the family trusts through a new company he would form to be known as Alpha Management Company. Alpha Management, from its inception, collected the $300-per-well charge from participating owners, including Green Wolf.

In 1983, after two productive and profitable years, Griffith Resources experienced the same decline in drilling and well activity with which the entire industry was faced. In the spring of 1983, the First National Bank, from which Griffith Resources had borrowed approximately four million dollars, required a significant reduction of debt before Griffith's loan would be renewed. Griffith was faced with the choice of putting capital in the neighborhood of one million dollars into the company, or face foreclosure of the Bank's interest. Greenberg had personally guaranteed $500,000 of this debt. Wolfberg and Greenberg met in Hawaii about this time, and discussed the need to meet the cash call. Following the

meeting, Wolfberg wrote a letter to Greenberg proposing that their share of the debt reduction be paid by borrowing through Green Wolf and loaning the money to Griffith Resources. This was ultimately done, and the bank's requirements were satisfied. The note from Griffith Resources to Green Wolf was later subordinated to the bank's note, as a requirement for a later renewal. Griffith Resources continues to be a viable if not profitable entity, and to reduce its debt.

During this time, Wolfberg suffered extreme health problems, having had cancer, resulting in a lengthy hospital stay and recuperation, and having suffered severe mental problems in the winter of 1984 and spring of 1985, also resulting in hospitalization and recuperation. In December, 1984, following a telephone conversation on the same subject, Greenberg, by letter, announced his withdrawal from the Green Wolf partnership. Greenberg requested that Wolfberg make any suggestions for dissolution he thought appropriate, and execute documents designed to facilitate the transfer of ownership. Wolfberg never responded to Greenberg's requests, nor corresponded or communicated with Greenberg in any way, from that point on, concerning the dissolution, management, or operation of Green Wolf.

Greenberg continued to operate Green Wolf's wells through Alpha Management, making a capital distribution to the partners in May, 1985, and August, 1985. The partnership debt, originally expected to be paid in February, 1986, was not paid until April, 1987. The partnership note was renewed by Greenberg in August, 1985, without the knowledge or permission of Wolfberg.

Following institution of this suit, an audit of partnership accounts was undertaken by Wolfberg's representatives. Following the audit, Wolfberg's allegations of wrongdoing are: (1) that the receipt by Alpha Management of the $300-per-well operating charge from Green Wolf resulted in a profit to Alpha and thus Greenberg to which he was not entitled, the theory of recovery being based on either breach of agreement or breach of fiduciary duty or both; (2) that the $400,000 loaned by Green Wolf to Griffith Resources should have been a debt of Greenberg rather than of Green Wolf, because Greenberg misrepresented the circumstances of the transaction; and (3) that the renewal of the Green Wolf note in August, 1985, after the partnership ceased, was a wrongful act on Greenberg's part.

The $400,000 borrowed by Green Wolf was for the benefit of Griffith Resources, Inc., and with it and $600,000 obtained from another principal, Griffith Resources' indebtedness with First National Bank was reduced. This debt reduction was a requirement of the Bank before it would renew or extend existing notes. Failure to make this payment would have resulted in foreclosure of the bank's interest and the complete collapse of Griffith Resources. The Court finds that contrary to plaintiff's allegation, the purpose of the one million dollar payment was not to relieve Greenberg's liability on his personal guaranty, but to prevent foreclosure of the bank's interest. The Court finds that Wolfberg, plaintiff herein, was fully aware of the purpose of the debt reduction. The loan of $400,000 from Green Wolf to Griffith Resources was his suggestion and for the purpose of bailing out their joint faltering investment, not

to protect his brother-in-law from liability. The Court finds that Wolfberg knew that Greenberg was not personally liable for the entire four million dollar debt to the bank, or for the one million dollar cash call, and further knew that the purpose of the cash infusion into Griffith was to keep it afloat in hopes of better days soon in the oil industry. The Court finds that Wolfberg's testimony concerning the circumstances surrounding the Griffith Resources note is incredible and that the unbelievability of Wolfberg's testimony in this regard taints his credibility with respect to every other issue. Wolfberg is an experienced investor, entrepreneur, and, by his own description, a deal maker, and his purported misunderstandings concerning the nature of his ownership in Griffith Resources, his liability for a cash call, Greenberg's liability, and the purpose of the debt reduction are completely unbelievable, especially considering his letter to defendant following their meeting.

In short, the Court finds no breach of fiduciary duty on the part of Greenberg with respect to the Griffith Resources note. The Court finds that Wolfberg had no misunderstanding, but, if in fact he did, it was not due to any misrepresentation by Greenberg.

With respect to Wolfberg's claim that Greenberg wrongfully renewed a partnership debt after dissolution of the partnership, the Court finds no wrongful conduct on the part of defendant. It is required, as part of his fiduciary duty, that defendant wind up the partnership affairs in a reasonable time. Following defendant's letter of December 19, 1984, wherein he announced his intention to withdraw from the partnership, defendant con-

tinued to operate the partnership affairs for the purpose of retiring the partnership debt. Capital distributions were made to the partners twice following defendant's letter announcing his withdrawal. It is plaintiff's contention that those capital distributions should have been used to reduce the debt and that defendant's failure to retire the debt earlier, and his renewal of the partnership note, both constitute a breach of fiduciary duty. Plaintiff's claim must fail for two reasons. First, he can show no damage inuring to him as a result of the extension of the partnership debt or the distribution of capital to the partners. Both were to his benefit, as he received cash equal to that of defendant in the capital distribution. Plaintiff cannot be heard to now complain of capital distributions when he accepted them when made without protest or suggestion to the contrary, or any communication whatsoever concerning the management or operation of Green Wolf or the retirement of its debt. As Green Wolf continued to profit despite declining oil revenues as a result of the renewal of the partnership note, regardless of the benefit to plaintiff, the Court finds that in renewing the note defendant acted within his duties as a responsible and cautious manager. Plaintiff can claim no breach of fiduciary duty when the actions taken by defendant were to the benefit of plaintiff and appear to be reasonable and prudent in the operation of the partnership.

The final issue for decision is the propriety of Greenberg's company, Alpha Management, charging Green Wolf its share of the $300.00 per month per well administrative charge. As mentioned above, Green Wolf, itself, had charged $300.00 per

month per well to its investors since 1979. The amount was reasonable. The charge is designed to cover the administrative and accounting costs incurred to operate each well. Although Green Wolf billed itself for its proportionate share of the $300.00 monthly fee, it never paid its share until Alpha Management took over the operation of the wells. When the parties attempted to split their joint interests in 1982, but maintained their partnership in Green Wolf, Greenberg took over management of Green Wolf through his wholly-owned company, Alpha Management. There was no formal agreement concerning the $300.00 charge, but Alpha collected it from Green Wolf from the beginning. In his letter of resignation from the partnership in December, 1984, Greenberg indicated his intent to continue operating the Green Wolf properties through Alpha, further providing that any "benefits received from our other partners would continue to be shared equally between us." (Plaintiff's Exhibit 2) Plaintiff devoted much time at trial to attempting to prove that the income to Alpha from the monthly charge was in excess of its expenses reasonably related to operating the Green Wolf wells, and that therefore defendant had breached his fiduciary duty.

Plaintiff cites law standing for the proposition that one partner may not make a profit for himself individually out of the partnership business. Uniform Partnership Act (OKLA.STAT. tit. 54, §221(1); KAN.STAT.ANN. §56-321 (1983); *Phillips v. Kula 200, Wick Realty, Inc.*, 2 Haw.App. 206, 629 P.2d 119 (Haw.Ct.App. 1981). Plaintiff further cites law standing for the proposition that a partner, occupying a fiduciary position with respect to his other partners, owes a higher and greater duty to

a partner than to one with whom he deals at arms' length. *In re Longhorn Securities Litigation,* 573 F.Supp. 255 (W.D. Okla. 1983); *Oklahoma Company v. O'Neil,* 440 P.2d 978, 984 (Okla. 1968). While plaintiff concludes that these authorities support the proposition that defendant breached his fiduciary duty by profiting, through Alpha Management, from the well charge paid by Green Wolf, plaintiff does not explain how he himself can be exempted from the duty to treat a partner fairly which he would impose upon defendant. In this case, plaintiff withdrew completely from partnership affairs as early as 1982, living in Hawaii and operating Service Computer Forms, all other family shares of which he had purchased for himself. He left the complete day-to-day operation and management of Green Wolf to the defendant, and refused to communicate in any way with defendant regarding the dissolution of the partnership. When Alpha Management took over the operation of Green Wolf properties in 1982, it commenced paying the salaries of employees, formerly paid by family businesses, whose duties still involved family interests (including plaintiff's) other than Green Wolf. Alpha assumed the cost of office space, employee salaries, and other legitimate business expenses which plaintiff would otherwise have had to pay for individually, to protect his share of the family interests being run by Alpha. The testimony of Greenberg was that he never took a salary from either Alpha or Green Wolf and, in fact, Alpha never made a profit and required his capital infusion to continue operations. Additionally, Alpha assumed the risk of loss if any well had required expenses in excess of the monthly fee. While plaintiff claims that he never

knew Alpha was charging this fee to Green Wolf, it is through his own neglect of partnership affairs that he did not know, if in fact he did not. No effort was made by Alpha or Greenberg to hide the charge from Wolfberg, and defendant's letter assuring that benefits from other partners would continue to be shared clearly stated the status quo would be maintained. The monthly charge had been collected from Green Wolf for two years when that letter was written and no agreement to the contrary is evidenced by the letter. The Court finds that no agreement existed that Alpha would not charge Green Wolf its share of the monthly fee. The payment by Green Wolf to Alpha prevented plaintiff's personal liability for management fees, the fee itself was reasonable, and neither Alpha nor Greenberg made a profit from the monthly charge to Green Wolf. The Court thus further finds that the imposition of the monthly well charge against Green Wolf was not a breach of fiduciary duty.

In accordance with the foregoing, the Court finds that plaintiff has failed to sustain his burden of proof on any of his alternative theories of recovery. Plaintiff is, however, as agreed by all parties, entitled to a dissolution of the partnership, and conveyances to accomplish that end have apparently been agreed upon by the parties. It is therefore the order and judgment of this Court that plaintiff have and recover nothing against defendant by way of his claims of breach of agreement or breach of fiduciary duty, and that the parties execute any deeds, conveyances, and agreements necessary to achieve full dissolution of the Green Wolf partnership. A judgment shall enter accordingly.

IT IS SO ORDERED this *17* day of December, 1987.

/s/

ROBIN J. CAUTHRON
UNITED STATES MAGISTRATE

APPENDIX B

FILED
December 17, 1987
United States District Court,
Western District of Oklahoma
Robert D. Dennis, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-2441-C

LAURENCE B. WOLFBERG,
Plaintiff,

v.

ROBERT I. GREENBERG,
Defendant.

JUDGMENT

Upon consideration of all testimony and exhibits offered at trial, the briefs and arguments of counsel, and the Court's Memorandum Opinion,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff has failed to sustain his burden of proof on all theories of recovery for which damages are sought and judgment shall accordingly be for defendant. The Court further ORDERS, ADJUDGES AND DECREES that both parties are entitled to dissolution of the partnership and that each party shall execute the deeds, conveyances, and agreements mutually agreed upon to achieve that end.

DATED this *17* day of December, 1987.

/s/

ROBIN J. CAUTHRON
UNITED STATES MAGISTRATE

Entered in judgment 12-17-87

APPENDIX C

FILED
United States Court of Appeals
For the Tenth Circuit
May 31, 1989
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1095
(D.C. No. CIV-86-2441-C)
(W.D. Okla.)

LAURANCE B. WOLFBERG,
Plaintiff-Appellant,

v.

ROBERT I. GREENBERG,
Defendant-Appellee.

ORDER AND JUDGMENT*

Before **MCWILLIAMS, TACHA,** and **EBEL, Circuit Judges.**

This is an appeal, pursuant to 28 U.S.C. §636(c)(3), from a final decision of the magistrate finding that the imposition of a monthly well charge against the partnership prior to dissolution was not a breach of the defendant's fiduciary duty. Based on the facts as they appear in the

record and as argued on appeal, we find no basis for holding that the magistrate was clearly erroneous. We **AFFIRM.**

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

---

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

APPENDIX D

FILED
United States Court of Appeals
For the Tenth Circuit
June 26, 1989
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1095

LAURENCE B. WOLFBERG,
Plaintiff-Appellant,

v.

ROBERT I. GREENBERG,
Defendant-Appellee.

ORDER

Before **TACHA, McWILLIAMS** and **EBEL, Circuit Judges.**

This matter comes on for consideration of appellant's petition for rehearing in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

/s/
ROBERT L. HOECKER, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-2441-P
November 17, 1988

LAURANCE B. WOLFBERG,
Plaintiff,

-vs-

ROBERT I. GREENBERG,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBIN CAUTHRON
UNITED STATES MAGISTRATE
UNITED STATES COURTHOUSE
OKLAHOMA CITY, OKLAHOMA

REPORTED BY:

BETH ANN KIMREY, C.S.R., C.P.
OFFICIAL COURT REPORTER
3122 FEDERAL BUILDING
200 N.W. FOURTH STREET
OKLAHOMA CITY, OKLAHOMA 73102

I was administrative and production manager of that company.

Q What did National Oil Tool do?

A They made rock bits for the oil industry, seismic rock bits.

Q Okay. Go ahead, sir.

A And after that, established a business in 1958 called Service Business Forms, Incorporated, Wichita, Kansas.

Q Are you familiar with a gentleman named Robert Greenberg, the Defendant in this case?

A Yes, I am, he's my brother-in-law.

Q Have you and he formed a general partnership in 1975 called the Green Wolf Oil Company?

A Yes, sir, we did.

Q Was that partnership agreement evidenced in writing?

A Yes, it was.

MR. McCUTCHEON: May I approach the witness?

THE COURT: Yes.

Q (By Mr. McCutcheon:) I hand you what has been marked Plaintiff's Exhibit 1 and ask you if that is not a true and correct copy of the general partnership agreement signed by you and Mr. Greenberg for a partnership called Green Wolf Oil Company?

A Yes, sir, it is.

MR. McCUTCHEON: I offer Plaintiff's 1.

THE COURT: It will be admitted.

Q (By Mr. McCutcheon:) What was the purpose of the partnership of Green Wolf Oil Company?

A It was our intent and the purpose was to take leases that the family had and develop them, try to get more production and to look for additional prospects in order to drill them.

Q Did that partnership eventually grow out of a family asset base and into a regular business?

A That is true.

Q From the beginning of the partnership of 1975, what were the division of responsibilities, if any, between yourself and your partner Robert Greenberg?

A Well, I called small businesses to start and we did whatever was necessary. But, principally, I found the deals that were floating around in the Wichita area and I did the production work necessary on the wells. We had some reworks and we had some amount of success. And then one thing leads to another. But, principally, I — because I was in Wichita, I did most of the work having to do with the oil business at that time.

Q What was your brother-in-law's background, education?

A He had a good background. He attended Wharton School of Finance and also Columbia.

Q Law school?

complete, and operate wells and you had outside investors who helped you raise drilling capital?

A That's correct.

Q During this time of activity, were the responsibilities and the division of those responsibilities that you've testified earlier to -- do they basically remain the same?

A Pretty much. We each did a little more, though. Things were growing. And like every small company — we were not a large company, so we had to do a lot of different things.

But, principally, I handled the production and those type of decisions, finding transactions, finding deals. And my brother-in-law principally ran the Seiverling interest and decided, or at least obtained, the financing from what we called outside parties.

Q Whatever the division of responsibilities were, what was the communication like between you during that time of activities as partners?

A Very good.

Q Very good?

A Very instant. If we had a problem, we knew it in minutes and we tried to solve them. We did whatever we had to do.

Q As to accounting matters for the partnership, I take it as an operator you would have to pay invoices and then bill

out your partners for their pro rata share, that sort of thing; is that correct?

A That's correct.

Q And as an operator, under joint operating agreements you are entitled, are you not, to charge a producing well fee once a well goes on line?

A Yes, that's true.

Q Okay. Whatever that fee was, which will come out later in testimony, were you actively involved in supervising that sort of thing or was that Mr. Greenberg's responsibility?

A That was Mr. Greenberg.

Q Did you pretty much leave those kinds of decisions to him?

A Never had any reason to question.

Q In 1982, did the business relationship between you and Mr. Greenberg change in any material respect?

A Yes, it did.

Q Tell the Court very briefly what happened to the business relationships between you and Mr. Greenberg at the end of '82.

A Well, the — about that period of time, my brother-in-law was concerned about the exposure that we had and all the money that seemed like we were building towards in our operation expanding, it was never available. It was

A Maurice Maloney.

Q Do you live in Oklahoma City, Mr. Maloney?

A In Midwest City.

Q By whom are you employed?

A By Alpha Management Corporation.

Q Do you hold an office or position with that company?

A Yes, I'm vice-president and director.

Q Have you been involved with the company since its inception?

A Yes.

Q When was it incorporated?

A November 1st, 1982.

Q Are you familiar with the common stock ownership of Alpha?

A Yes.

Q What has been the common stock ownership of Alpha Management since its inception?

A It's 100 percent owned by Mr. Greenberg, Robert Greenberg.

Q Mr. Robert Greenberg that's the Defendant in this case?

A Yes.

Q Since its inception, Alpha has primarily been an accounting oriented company; is that not true?

A Administrative I would say more than — rather than just accounting.

Q Would you estimate, please, for me over the same time period the number of expenses and bills that have to be paid by Alpha, as they relate to Green Wolf on a recurring monthly basis?

A 60 to 70.

Q During this period of time, Green Wolf had a group of outside investors that participated in wells, did they not?

A Yes.

Q Would you estimate or tell the Court the approximate number of those outside investors?

A 15 to 20, all total.

Q When Alpha took over the administration of the Green Wolf properties, Alpha immediately started charging Green Wolf, the partnership, that is, the $300 a month producing well rate; is that not correct?

A It charged an amount equivalent to $300 per month per well.

Q And then Green Wolf, in turn, billed that charge out to its investors, did it not?

A As it had been, yes.

Q And prior to Alpha's coming into the picture, Green Wolf, when it would bill out $300 to its outside investors, would it bill it to itself also?

A Yes.

Q But the net effect of that would be that it would be

paying itself as to whatever interest in that well is owned, right?

A Yes.

Q So there would be no cash out of Green Wolf?

A No — no checks changed hands.

Q And once Alpha came in, cash would go out of Green Wolf as to Green Wolf's percent into Alpha?

A Yes.

Q Was it Alpha's function for part of this $300 per well administration fee to make decisions on major capital expenditures on the wells?

A I don't know what you mean by major capital expenditures.

Q What would you consider major in terms of your guidelines as to the authority Alpha had versus the authority somebody else may have had?

A Oh, probably anything over $1,000.

Q Anything over $1,000 Alpha would not have the authority to spend on its own?

A Not directly, not without consulting with the partners.

Q And those partners were?

A Well, the principal partners of — of Green Wolf Oil Company.

Q And those partners were?

A Mr. Wolfberg or Mr. Greenberg.

Q And so there was profit to Green Wolf in the $300 a month charge?

A Certainly to the extent that we collected that money rather than not collecting it. This helped defray our expenses.

Q And so were you saying here, sir, that any profits with respect to the $300 a month operating well charge would continue to be shared equally between you and Mr. Wolfberg?

A Yes. That — that charge has remained in place to this day and thereby reduced the charges that both Mr. Wolfberg and I paid.

Q But as a practical matter, sir, since October — or November 1 of 1982, there has been no profit in that $300 a month well charge, has there not, because you paid that amount to Alpha?

A Well, it has enabled us to keep our producing well charge rate of $300 per well the same. That's been in place since 1979.

Q The point is Alpha now really has those profits, not Green Wolf?

A Alpha, in — in exchange for taking the passer of the $300 per well, agreed to take on expenses somewhat in excess of that. They were formally shared by Mr. Wolfberg and myself through a combination of various other entities.

Q Regarding Plaintiff's Exhibit No. 12, which is the note

A Yes, sir, I have. Mr. Maloney's deposition included an annualization of those charges, and it tied out virtually without exception.

Q The next line says "Net Profit to Alpha." What is that line? How did you get to that line?

A That is simply the subtraction — projected costs, Alpha; subtracting average bill, Green Wolf.

Q That's on a monthly basis?

A Yes, sir, that is. That would be the anticipated profit or the profit that I projected Alpha to be deriving on a monthly basis from its arrangement with Green Wolf.

Q The next line is annualized profit. Did you simply annualize the net profit line?

A I multiplied it by the number that you see directly below it.

Q That's the number of months remaining in that year?

A Yes. Or for the number of months that the fee was charged during the year.

Q The next line says "Average Monthly Profit Over Four Years," and then there's a number to the right. It says "2,795." Where did you arrive at that number?

A That is a weighted average of the annualized profit for each of the years reflected on the schedule.

Q And then extended through October '87, 2,795 times 16 months. Would that represent the amount of time which

Alpha has charged Green Wolf those fees?

A Yes, sir, it does.

Q For a total of how much?

A The total is $167,677.

Q Then you have an interest at the ten percent line, do you not?

A Yes, sir.

Q And what is that based on?

A That is an interest calculated for the monthly $2,795 profit based on a current cost of capital of approximately ten percent.

Q Whose cost of capital?

A That's Mr. Wolfberg's cost of capital.

Q Are you familiar with the cost of capital over the years, '82, 3, 4, 5, 6, and 7?

A Yes, sir, I am.

Q And is that ten percent figure conservative or liberal?

A I would say it's extremely conservative, particularly for 1982 and 1983. Prime rates at that time were anywhere from 18 to 20 percent.

Q Now, looking at your dropping of medical expense. That medical expense has run 8,697 for '82, 10,661 for '83 and so forth. But you have completely taken that out in this, less T & E plus medical line, have you not?

A Yes, sir, I have.

Q What about the secretarial staff, when you had one?

A It was paid by Green Wolf.

Q Now, did you have any discussion with Mr. Wolfberg about whether or not Alpha would receive the $300 per month administrative charge or well service charge or whatever it is?

A Yes, because we had to talk about that because I was assuming expenses formerly paid by Service Computer Forms. Mr. Maloney had to resign as a corporate officer, et cetera. It was all part of this deal of splitting off. And I would assume his expenses — all the expenses formerly shared, Alpha would take over. For that, the production — or the well overhead charge, those type of things, would be assumed. And it would be done in a way that would be about as close to a balance as you could get.

But, in any case, I would be taking those over. And I believe I further stipulated that I would not be charging any time — salary for any of my time on any of these still undivided interests.

Q Now, was there any discussion about, "There won't be any profit?"

A I don't recall any, nor do I recall any discussion. I'm sure it didn't happen. There was no discussion on any loss, either. And, obviously, if you're going to take over oil properties at a —

your testimony now that you as a partner were entitled to make a profit off of Mr. Wolfberg simply because he left to go to Hawaii and you picked up the administrative duties. You're not testifying that now, are you?

A I'm not testifying that what?

Q That you are entitled to now make a profit off of him as a partner?

A Our agreement was that I would take over the duties, absorb certain costs, and take over the administrative overhead income. It could well provide a loss.

Q And there was no discussion of profit or loss at that particular time?

A Not my recollection.

Q In the Alpha records — and I haven't seen them produced here in court — but are there any separate ledger journals or other records from which someone like Mr. Wolfberg could come in and say with reasonable certainty what costs of Alpha are actually attributable to Green Wolf operations?

A I don't think we ever segregated the costs. About 90 percent of what we did was for what — what Mr. Wolfberg and I considered mutual family interests.

Q There was some question of you yesterday — or, I'm sorry, questions of Mr. Wolfberg yesterday about whether or not this Defendant's 13 had been furnished to me as his

APPENDIX F

Plaintiff's Exhibit 1

GENERAL PARTNERSHIP AGREEMENT GREEN WOLF OIL COMPANY

THIS PARTNERSHIP AGREEMENT, made and entered into as of this 1st day of January, 1975, between Robert I. Greenberg and Laurence B. Wolfberg.

1. Pursuant to the Kansas Uniform Partnership Act, the parties hereto do hereby form a General Partnership under the firm name "Green Wolf Oil Company" for the sole purpose of engaging in the exploration for and development of hydrocarbons and the production thereof, and acquiring existing production and doing all things incidental to the operation of such activities.

The principal place of business of the partnership shall be 815 East Second Street, Wichita, Kansas, with such other places of business as may be agreed upon by the partners from time to time.

2. Each partner shall contribute to the partnership one-half of the costs of acquisition, exploration, completion and development of prospects from time to time as the partnership acquires such prospects.

3. The net profits and losses of the partnership shall be divided equally between the partners.

4. The partners shall draw such salaries from time to time as may be justified for their services and agreed upon between the partners.

5. The partnership shall make an election to deduct intangible drilling and development costs on its Federal Income Tax Return in accordance with the option granted by the Internal Revenue Code of 1954, as amended. No election shall be made by the partnership or any of the partners, for the partnership to be excluded from the application of the provisions of Subchapter K of the Internal Revenue Code of 1954, as amended.

6. Each partner shall have an equal voice in the management and any action taken by either partner in behalf of the partnership within the scope of the partnership business shall be binding upon the partnership. The partnership shall carry its bank account in the Union National Bank of Wichita, Wichita, Kansas, and such other banking institutions as the partnership may from time to time determine. The books and records of the partnership will be kept at 815 East Second Street, Wichita, Kansas, or at such other place or places as the partners may from time to time determine.

7. The partnership may be dissolved at any time by agreement of the partners and shall be dissolved upon the death or resignation of either partner. In the event of dissolution, the partnership debts shall be paid, the partners' capital accounts equalized, and the remaining assets shall be divided equally between the partners in kind, or in the event such division in kind is impossible, then such assets as it is necessary to sell in order to effect the division shall be sold and the proceeds divided equally between the partners or the estate of a deceased partner as the case may be.

IN WITNESS WHEREOF, the parties hereunto set their hands and seal as of the day and year set forth above.

/s/ _____

Robert I. Greenberg

/s/ _____

Laurance B. Wolfberg

ALPHA MANAGEMENT
TAX RETURN SUMMARY

TAX RETURN LINE REF	DESCRIPTION	1982		1983		1984		1985		TOTALS
1	GROSS RECEIPTS	$176,587		$177,839		$172,664	<	$155,800		$682,890
11	TOTAL INCOME	178,188		177,839		172,664		155,800		684,491
12	COMP OF OFFICERS	62,580	33.74%	52,150	30.25%	53,608	29.64%	59,487	38.03%	227,826
16	RENT	0	0.00%	13,717	7.96%	14,322	7.92%	12,867	8.23%	40,906
17	TAXES		0.00%	4,210	2.44%	3,947	2.18%	4,419	2.83%	12,576
18	INTEREST	2,251	1.21%	4,183	2.43%	1,598	0.88%	793	0.51%	8,825
21	DEPRECIATION	8,000	4.31%	12,517	7.26%	15,264	8.44%	4,300	2.75%	40,081
26	OTHER DEDUCTIONS	109,308	58.94%	85,602	49.66%	91,920	50.82%	74,364	47.54%	361,196
27	TOTAL DEDUCTIONS	185,455	100.00%	172,380	100.00%	180,884	100.00%	156,408	100.00%	695,130
30	NET INCOME	(7,267)		5,459		(8,220)		(608)		(10,636)
	NOL CARRY FORWARD	(7,267)		(1,808)		(10,028)		(10,636)		(29,739)
OTHER										
	LEGAL & AUDITING	452	0.24%	0	0.00%	0	0.00%	0	0.00%	452
	TELEPHONE	8,328	4.49%	7,688	4.46%	9,379	5.19%	8,224	5.26%	33,619
	POSTAGE	1,592	0.86%	1,821	1.06%	1,635	0.90%	959	0.61%	6,007
	DATA PROCESSING	4,732	2.55%	4,493	2.61%	4,310	2.38%	4,779	3.06%	18,314
	GENERAL INS.	3,572	1.93%	4,370	2.54%	3,522	1.95%	7,044	4.50%	18,508
	RENT	13,188	7.11%	0	0.00%	0	0.00%	0	0.00%	13,188
	FICA TAXES	3,755	2.02%	0	0.00%	0	0.00%	0	0.00%	3,755
	PARKING	2,097	1.13%	2,072	1.20%	2,109	1.17%	1,526	0.98%	7,804
	TRAVEL & ENTERTAINMENT	60,791	32.78%	52,335	30.36%	60,708	33.56%	41,136	26.30%	214,971
	MEDICAL EXPENSES	8,697	4.69%	10,661	6.18%	7,652	4.23%	9,206	5.89%	36,216
	OTHER	2,104	1.13%	2,162	1.25%	2,605	1.44%	1,490	0.95%	8,361
	TOTAL	109,308	58.94%	85,602	49.66%	91,920		74,364		361,195
	TOTAL EXPENDITURES	$177,455		$159,863		$165,620		$152,108		$655,049
	LESS: T & E PLUS MEDICAL	69,488		62,996		68,360		50,342		251,187
	NET EXPENDITURES	$107,967		$ 96,867		$ 97,260		$101,766		$403,862
	MONTHLY AVG	$ 8,997		$ 8,072		$ 8,105		$ 8,481		$ 8,414
	ESTIMATED GREENWOLF %	60.00%		60.00%		60.00%		60.00%		60.00%
	PROJECTED COSTS ALPHA	$ 5,398		$ 4,843		$ 4,863		$ 5,088		$ 5,048
	AVG BILLED GREENWOLF	$ 6,300		$ 7,267		$ 7,860		$ 8,367		
	NET PROFIT TO ALPHA	$ 902		$ 2,424		$ 2,997		$ 3,279		
	ANNUALIZED PROFIT	$ 1,803		$ 29,084		$ 35,964		$ 39,344		
	# OF MONTHS	2		12		12		12		
	AVE MONTHLY PROFIT OVER 4 YRS									$ 2,795
	EXTENDED THROUGH OCT 87 ($2,795 x 60 MONTHS)									$167,677
	INTEREST AT 10%									48,730
	TOTAL									$216,407

Supreme Court, U.S.
FILED
OCT 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-502

In The

Supreme Court of the United States

October Term, 1989

LAURANCE B. WOLFBERG,

Petitioner,

v.

ROBERT I. GREENBERG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GAYLE FREEMAN COOK
JOHN T. EDWARDS
MONNET, HAYES, BULLIS,
THOMPSON & EDWARDS
1719 First National Center West
Oklahoma City, OK 73102
(405) 232-5481

Attorneys for Respondent

October, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit 1

APPENDIX A .....App. 1

APPENDIX B.....App. 9

TABLE OF AUTHORITIES

Page

CASES

Bowen v. American Hospital Association, 476 U.S. 610, 106 S.Ct. 2101, 90 L.Ed. 584 (1986) 4

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) 3

No. 89-502

In The

Supreme Court of the United States

October Term, 1989

LAURANCE B. WOLFBERG,

Petitioner,

v.

ROBERT I. GREENBERG,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In this response, Robert I. Greenberg will be referred to as "Greenberg" and Laurance B. Wolfberg as "Wolfberg".

Greenberg does not disagree that general partnership law precludes a partner from making a profit at the expense of the other partners unless they have agreed that he may do so. Greenberg does not question the Green Wolf partnership was organized in Kansas or that most, if not all the oil and gas interests of the partnership, are located in Kansas. Greenberg does not contend there is any difference in the law applying to partnerships between the States of Oklahoma and Kansas as far as this case is concerned.

Greenberg does disagree there is an issue that may properly be brought before this Court through Wolfberg's Petition for Writ of Certiorari. The "issue" presented is nothing more than Wolfberg's viewpoint on one of the facts resolved against him by the trial court.

At trial, Greenberg testified in effect that when Wolfberg moved to Hawaii, heaving Greenberg to manage not only the Green Wolf partnership, but other jointly owned and operated family properties, Greenberg proposed to operate Green Wolf and other family enterprises through a management company he would form to employ the staff who had theretofore performed necessary accounting and clerical services while on the payroll of a jointly owned business which had been purchased by Wolfberg prior to his move. Greenberg proposed the new operating company would retain the administrative well charge collected from the joint interest owners by Green Wolf. Such funds were to defray office rent, salary, telephone and supplies as far as possible. Any shortfall in expenses, salaries, etc. was to be paid by Greenberg in return for the staff doing whatever additional clerical work needed to be done on the property Greenberg received in the settlement. (See attached portions of the Transcript, Appendix "A"). Greenberg agreed to charge nothing for his services in managing family properties. Greenberg has never taken any money for his operation of any family properties nor is the administrative well charge sufficient to pay Alpha Management company's operating costs. Annually, Greenberg pays from his own funds Alpha's deficit. Wolfberg's evidence that Greenberg

had impermissibly profited was the testimony of an "expert" who concluded from examination of Alpha's records, that company devoted 60% of its time to tending to Green Wolf's affairs and that Green Wolf Oil Company's contribution to total expense exceeds that figure, therefore Greenberg has profited. He made no estimates as to the amount of time spent on other businesses jointly owned by Wolfberg and Greenberg and his assumption of time spent on Green Wolf was disputed by both Greenberg and Alpha's manager, M. A. Maloney. (See attached portions of the Transcript, Appendix "A").

The expert witness agreed his appraisal of profit would be irrelevant if Wolfberg had agreed to Greenberg's plan to use the partnership funds to defray expenses he would otherwise have to pay from his own pocket. The trial court recognized the expert's testimony as nothing more than an effort to identify a fictitious profit and held there was no factual profit. The trial court, as fact finder, was entitled to accept or reject the testimony of Wolfberg's expert. This Court gives great weight to the findings of the trial court, affirmed by the Court of Appeals. *National Collegiate Athletic Association v. Board of Regents of the University Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

It is not the function of an appellate court to substitute its views on factual questions for those of the fact trier. The panel for the Tenth Circuit found no reversible error in Magistrate Cauthron's decision. Wolfberg's petition seeking certiorari is a rehash of the argument at trial, and in his brief in chief to the Tenth Circuit Court and in his Petition for Rehearing, the argument that the decision of the Tenth Circuit will have a profound effect on the

interests of non-managing partners is no more sound than Chicken Little's claim that the sky was falling in light of the Tenth Circuit order that its ruling has no precedential effect and may not be cited by any court within the Tenth Circuit except for establishing the law of the case, res judicata or collateral estoppel. (See Order and Judgment of the United States Court of Appeals for the Tenth Circuit, dated May 31, 1989, attached as Appendix "B".

Certiorari to the United States Supreme Court ought not to be for the purpose of retrying fact questions, particularly, those that are correct and can affect only the parties to the action. This case was initiated out of Wolfberg's malice toward his brother-in-law. The Magistrate found his testimony on a salient issue incredible and so stated in her order. (See Appendix "A" to Wolfberg's Petition for Certiorari). This Court is not a forum to decide a manufactured claim. See *Bowen v. American Hospital Association*, 476 U.S. 610, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986).

Greenberg respectfully objects and asks Wolfberg's Petition for Certiorari be denied.

Respectfully submitted,

MONNET, HAYES, BULLIS,
THOMPSON & EDWARDS

By /s/ Gayle Freeman Cook
Gayle Freeman Cook
(OBA #3122)
John T. Edwards (OBA #2642)
1719 First National Center
West
Oklahoma City, OK 73102
(405) 232-5481
Attorneys For Respondent

APPENDIX A

(p. 261) acquiring rights to drill in areas that were, I thought, very promising and Mr. Wolfberg thought were very promising. We did do that. And we obtained three very prolific wells by doing that.

Q Did you have any complaints from any of your other participants about the amount of the charge?

A I never had a complaint from anyone on this until 1987.

Q All right. Now, let's go back to 1979 and '80. What kind of business was Green Wolf doing at this time? What kind of paperwork and business activities were they generating?

A In 1979 it was becoming very apparent that there was too much of a workload for the – the party in Wichita to satisfactorily handle. We decided, since Mr. Maloney was on the payroll and we were sharing his expenses anyway in '79 and '80, to get him involved and transfer all the administrative – and really, all the work of the Green Wolf office to Oklahoma City. By 1979, again, Mr. Wolfberg and his family has moved to Oklahoma City.

Q Let me interrupt you. Whose payroll was Mr. Maloney on?

A He was on the parent, Service Computer Forms.

Q Where did he come from?

A He had been an officer or the treasurer or equivalent at Service Computer Forms since it's inception in 1969. He (p. 262) had been my chief financial officer at Seiverling since 19 – actually at Seiverling, he – I hired

him. He preceded me. He went on the payroll before I did. I hired him in 1965, I believe. He actually served some time up in Ohio.

Q After Seiverling was liquidated, what did Mr. Maloney do?

A Well, the liquidation process was virtually completed by 1980, other than the sale of the – the last remaining asset, which was the building. It was a building of substantial size. But we ultimately sold that, I believe, in 1980.

So we – there was still work for Mr. Maloney to do on – as – as the treasurer of the parent, which controlled Service Business Forms; tax returns, things like that. But we agreed that it would be wise to – since Mr. Wolfberg was down here, to bring all the the operations down here of Green Wolf.

Q Prior –

A And we did this.

Q Prior to that time, had Mr. Maloney done any work for Green Wolf?

A He may have on occasion. I – I don't recall him offhand, or specifically doing anything other than maybe assisting me in letter writing or something when I was here (p. 263) in Oklahoma City.

Q How was Green Wolf's business handled?

A I would handle the – I would say, the legal, the accounting, financial, and – and much of the administrative, since Virginia Smith had been a – a woman that had

worked for me and Mr. Wolfberg for many years and my father. I knew her well. So she handled the administration and billings under me. And Mr. Wolfberg would handle, for the most part, the – the operational details, drilling and operations of the prospects in Kansas.

Q Did Green Wolf have an office?

A Green Wolf had a – a small office located in the building in which Service Business Forms occupies.

Q By this time, had it become necessary that Green Wolf have office space?

A Yes, we felt it was necessary. And we – we had an office for Mr. Wolfberg and myself when he relocated here. And it was natural to move – since we were both here, it was just easier to function having everything under one roof.

Q Do you know why Mr. Wolfberg moved to Oklahoma City?

A Well, I think it was a combination of reasons. There were many – many family considerations. His wife's mother was living here by that time. She had moved here maybe a

* * *

(p. 288) was no – there was no mechanics to make any kind of a setoff in the trust, nor did I think it was proper, and said that. And the notes that I made on that reflect that there would be no setoff. Instead, there would be a jewelry disclaimer. And I did not execute that contemporaneously on October 29th when many of the other documents were signed. But I did send him a letter to that confirming that sometime in November.

Q All right. Did you, at or near this time that you're making these other discussions, discuss what would happen to Green Wolf? How would it be handled?

A Well, certainly. In effect, when he would be gone, he – he had confidence that I – I could operate the properties. And there wouldn't, in fact, be no one also to operate them, anyway, if he was gone.

We discussed it. We even discussed the possibility of splitting off Green Wolf, decided we didn't need to do that at the time. There was some tax considerations involved with depletion, things like that.

And it was decided – he would be gone on a permanent basis. He was leaving Oklahoma City. I was going to be staying here, doing the best I could to manage properties still undivided but held in the – what I would call a family common interest. That included not only the Green Wolf properties, but the Griffith properties which were in

* * *

(p. 292) MR. McCUTCHEON: I'll object. He's continuing to go beyond the scope of the question, as to whether it's obvious or not obvious. The question was, "Was there any discussion?"

A None.

Q (By Mr. Edwards:) What expenses were you assuming in addition to the rent and the office space that had previously been paid by Green Wolf and whatever secretarial expense was paid?

A It's a list of the type of expenses that normally would be found in administrative overhead had it not been

partially subsidized by some of out outside entities. And I'm taking about salaries, payroll taxes, rent, telephone, parking charges, medical reimbursement that was formerly paid, things of this nature. If you add them up, they were approximately 10,000-a month that was taken over by Alpha.

Q Now, what were you going to receive from Green Wolf?

A I was going to receive what was already in place, which was the $300 a month producing well charge charged on each well, with each partner paying his percentage.

Q A partner and investor paying his pro rata share?

A Yes.

Q You would be – how much of that – how much money did that $300 per month generate toto?

A It was a mathematical figure, a flat fee, and it – it

* * *

(p. 294) Q (By Mr. Edwards:) You heard testimony to the effect yesterday that – if I may look at it – Green Wolf time is – Alpha's time is occupied approximately 60 percent by Green Wolf and 40 percent by the other entitles. Yet, Green Wolf is paying more pro rata of the Alpha Management costs than the other entities.

A Yes. That's what the chart purports to show. It's based on some assumptions, as Mr. Keeney said. The estimated Green Wolf time he came up with was 60 percent.

Q Is that accurate?

A I don't believe so. And he hasn't gotten that figure from anyone that I know of. I think that's his own conclusion. In any case – in any case, that chart only shows part of the picture of what was intended and what was agreed upon.

Q What does it omit?

A At the time in 1982, in October – on Ocotber 29th, when our – part of our common interests were split up and Mr. Wolfberg and his family moved to Hawaii. I was left with the responsibility and costs of operating not only Green Wolf through Alpha, but also Griffith, which we were doing significant work for, and, I believe, almost the entire accounting function of Griffith, which Mr. Wolfberg knew.

Q How had that been paid for prior to this time?

(p. 295) A We just paid for it, in the sense that we used part of Mr. Maloney's salary to do Griffith work. We just used –

Q Was anything changed under this arrangement?

A We didn't bill Green Wolf for it, so it would have been left out of that chart.

Q Do you bill the other entities that participate in Alpha?

A For a brief time, either Green Wolf or Alpha was getting a contribution from Griffith. But by 1983, things were so bad in the well servicing business that we simply subsidized Griffith by picking up the entire charge. But at no time did Griffith ever pay what the full cost was to do that work.

Q Did Mr. Wolfberg understand that?

A Yes. We had started Griffith in 1981. And the entire accounting function was done by Mr. Maloney in our office.

Q Well, tell me exactly what your agreement was with Mr. Wolfberg as to use by Alpha of the well administrative charges.

A This would cover the costs of administering, operating all costs associated with handling those interests that we still felt a common interest in, which included not only Green Wolf on that chart, but also Griffith, the family trusts, things of that nature that would ultimately come to the benefit of both families.

(p. 296) Q Does Alpha make a profit?

A Alpha, I don't recall, ever making a profit.

Q Well, where does Alpha get its money?

A Alpha gets its money, a good part – part of it comes from Green Wolf, approximately $96,000 a year. The rest comes from charges to the golf courses for management fees, time I spend down there, that type of thing, and nominal revenue from some other interests, but it's – it's nothing substantial. As a result, it's usually left with a deficit by the end of the year, which I make up out of my pocket.

Q All right. Have you ever taken a dime out of Alpha Management?

A I've never taken any salary out of Alpha. I have put in a substantial amount of money into Alpha to balance that budget.

Q Have you charged any salary, either to Alpha or to Green Wolf, for your services?

A No, I've never taken any salary from either Green Wolf, Alpha, the trusts, or Griffith.

Q Did you have an agreement that you would make no profit or that Alpha would make no profit?

A I had an agreement that I would take no salary from any of these entities but that I would operate them.

Q What do you do for these entities?

A I do the best I can, as I see my responsibility to

* * *

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LAURANCE B. WOLFBERG, Plaintiff-Appellant, v. ROBERT I. GREENBERG, Defendant-Appellee.	)	No. 88-1095 (D.C. No. CIV-86-2441-C) (W.D. Okla.)

ORDER AND JUDGMENT*
(Filed May 31, 1989)

Before MCWILLIAMS, TACHA, and EBEL, Circuit Judges.

This is an appeal, pursuant to 28 U.S.C. § 636(c)(3), from a final decision of the magistrate finding that the imposition of a monthly well charge against the partnership prior to dissolution was not a breach of the defendant's fiduciary duty. Based on the facts as they appear in the record and as argued on appeal, we find no basis for

---

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

holding that the magistrate was clearly erroneous. We AFFIRM.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge